

1                   Okay, I appreciate all of that.  
2       How does that variation strike you, Mr.  
3       Schmidt?

4                   MR. SCHMIDT: I think that's fine,  
5       Your Honor, as long as we're allowed to do the  
6       same thing. As long as --

7                   JUDGE SIPPEL:           You'd be  
8       countering, in other words. So they take  
9       pages five and six and you say well, I want to  
10      use pages eight and nine because it  
11      characterizes it differently, something like  
12      that.

13                  MR. SCHMIDT: We've actually  
14      already done that process except for two  
15      witnesses where we agreed we would do that a  
16      little later.

17                  If Your Honor is going to be  
18      looking at the entire transcripts beyond the  
19      designations, we'd want to put in our entire  
20      transcripts.

21                  JUDGE SIPPEL: Believe me, I will  
22      not look at the entire transcripts.

1 MR. SCHMIDT: That answers our  
2 question.

3 JUDGE SIPPEL: That will not  
4 happen.

5 MR. SCHMIDT: That answers our  
6 question, Your Honor.

7 JUDGE SIPPEL: That's why I  
8 suggest, I say as a practical matter, at least  
9 as far as any cases that I'm handling, just  
10 don't put the whole thing in as an exhibit,  
11 unless you've got a reason, specific reason to  
12 bring it in under the rules or something. But  
13 anyway, that's neither here nor there.

14 We've ruled -- again, I'll say the  
15 objection on the deposition transcripts is now  
16 moot.

17 MR. SCHMIDT: Okay.

18 JUDGE SIPPEL: And denied as moot.  
19 Now where do we go from there?

20 Generic 1, Generic 2?

21 MR. SCHMIDT: Generic 2 is that  
22 Your Honor had in Your Honor's order of

1 January 29, 2009, the further revised  
2 procedural and hearing order, footnote five,  
3 Your Honor indicated that the witnesses, I'm  
4 sorry, that the exhibits would be identified  
5 with a descriptive title of the exhibit, the  
6 number of pages in the exhibit and  
7 identification of the sponsoring witness of  
8 each exhibit.

9 And we have a number of Comcast  
10 exhibits where we think the identification of  
11 the sponsoring witness is insufficient because  
12 it says something to the effect of produced by  
13 NFL or something of that nature and frankly,  
14 in many, many instances where this happened,  
15 it's of no moment because you look at the  
16 exhibit and it's absolutely clear who Comcast  
17 is going to credit and introduce that exhibit  
18 through in terms of it's from one of the  
19 witnesses that one of the parties is calling  
20 live.

21 There's some instances and  
22 examples of this would be Excel spreadsheets

1 or witnesses from someone who is not being  
2 called live for their designation or their  
3 testimony on this exhibit has not been  
4 designated, where it's unclear how that  
5 exhibit can come in. And there's no  
6 indication as to who it's going to come in  
7 through.

8 And in those specific instances  
9 and I have a list in front of me of about six,  
10 we think Comcast should have to identify who  
11 is going to sponsoring that exhibit or  
12 withdraw that exhibit.

13 JUDGE SIPPEL: Are there many of  
14 these documents?

15 MR. SCHMIDT: There's a very large  
16 number that have this problem where it doesn't  
17 identify the specific sponsoring witness which  
18 is, I think what Your Honor directed the  
19 parties to do.

20 What we have tried to do is go  
21 through that very large number and identify  
22 the ones that really give us pause, because

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1       it's just not clear -- some of them, for  
2       example, might be from -- I am making this up,  
3       but some of them might be from Frank Hawkins,  
4       one of the witnesses in this case.

5               We're pretty confident who is  
6       going to be the sponsoring witness for that  
7       document in Comcast's case. Some of them,  
8       that information isn't apparent and those are  
9       the ones we focused on where either it relates  
10      to a witness who has not been called and his  
11      testimony has not been designated on that  
12      subject.

13             In one instance, we found one  
14      where there was an exhibit that was cited in  
15      the trial brief where it was cited for a  
16      specific proposition attributing that  
17      proposition to an NFL witness where in the  
18      testimony the witness said that was what we  
19      heard from someone else. That was what we  
20      heard from another cable company.

21             In other instances, you have  
22      things like you have Excel spreadsheets where

1       it's just unclear who that spreadsheet would  
2       ocme in through and those are the places where  
3       we're raising this objection. I have a list  
4       of six of those exhibits.

5               JUDGE SIPPEL: So if we ruled on  
6       the six, maybe the others could kind of take  
7       care of themselves, do you think?

8               MR. SCHMIDT: We think that's  
9       right, Your Honor.

10              JUDGE SIPPEL: Have you talked  
11       about -- to Comcast counsel about those six?

12              MR. SCHMIDT: No, not yet. We're  
13       frankly reviewing these this weekend, Your  
14       Honor, in terms of formulating our final  
15       position on --

16              JUDGE SIPPEL: If you can reduce  
17       it to six and you have time maybe to -- if  
18       there is a break, there will be a break, to  
19       talk to counsel about them, maybe you can just  
20       resolve that. On the other hand, if we can't  
21       resolve it, if there's only six documents, I  
22       can rule on them as they come in.

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1 I mean I agree with you, certainly  
2 agree with your concern about a Excel  
3 spreadsheet. Who prepared that? If somebody  
4 is qualified -- the reason for the  
5 identification of authorship is primarily for  
6 reliability, and of course, the significance  
7 of it. I mean if it's a document that was  
8 prepared by the president of the company,  
9 that's different than somebody lesser. On the  
10 other hand, if it's done by somebody lesser  
11 who is an expert in something and there's a  
12 significance to that too. But it's basically  
13 for reliability. What can I rely on if I  
14 don't know who did it? An Excel sheet would  
15 be a good example. How could I rely on that  
16 if I don't know who put the numbers together.

17 MR. CARROLL: Well, Your Honor,  
18 I'm happy to look at the six, but I think this  
19 is correct and Mr. Schmidt will correct me.  
20 These are his documents. They're not my  
21 documents.

22 JUDGE SIPPEL: Their Enterprise

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1 documents?

2 MR. CARROLL: They're admissions.  
3 They're business records of NFL Enterprises.  
4 I have to -- I'm used to saying NFL, so I will  
5 try not to make that mistake. But I think the  
6 six are all their documents.

7 Second, Mr. Hawkins is their  
8 witness in their case. He's not part of my  
9 direct case.

10 Third, I don't even have to give  
11 them my cross exhibits yet, but I've done them  
12 a favor to the extent I've already identified  
13 for them some exhibits that would only be  
14 coming in through their witnesses because  
15 they're their documents.

16 So I don't think -- I don't  
17 understand again, because under the rules,  
18 their documents are admissions from them.

19 I will say on the sponsors, they  
20 gave us in their exhibit designation a list of  
21 all their exhibits and all the sponsoring  
22 witnesses they wanted on there. A lot of

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1       those exhibits may be my documents because  
2       this would be part of their case. And I may  
3       not have an objection to them except that I  
4       don't agree with the sponsoring witness  
5       they're identifying. But my way of addressing  
6       that was going to say if it's my document,  
7       it's coming in. It's a business record of  
8       Comcast, just as if it's their document, it's  
9       coming in. And it doesn't matter, we don't  
10      have to get caught up on who the sponsoring  
11      witness is and whether he's fairly attributed  
12      to one witness or another.

13               JUDGE SIPPEL: Of course.

14               MR. CARROLL: And that's where I  
15      am on this issue.

16               JUDGE SIPPEL: And I didn't make  
17      that clear. I should have made it more  
18      clearer to that extent, but yes, absolutely.  
19      I'm trying to focus on documents that are  
20      prepared by a party that's trying to bring it  
21      in, and without disclosing a sponsor.

22               On the other hand, if you're

1 picking up the other party's documents and  
2 their business records and they meet all of  
3 those niceties, important niceties, then I  
4 don't see what the problem is.

5 Mr. Schmidt, is there anything  
6 further on this?

7 MR. SCHMIDT: The only thing I  
8 would say, Your Honor, if I could just  
9 identify these so they're on the record and so  
10 Comcast has notice of them. It's 35, 41, 137,  
11 186, 194, and 252.

12 And to give one example of them,  
13 Exhibit 41 is an email from a gentleman who is  
14 not a live witness in this case. He does not  
15 copy anybody who is a live witness on this  
16 case. It includes as an attachment a memo  
17 that does not involve anyone who is a live  
18 witness in this case. Where there are  
19 questions and answers that were asked to the  
20 witness at the deposition about this document,  
21 none of those are designated. That seems to  
22 us like something that cannot fairly come in

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1 on that state of the record.

2 Another example, and now we're at  
3 a point where frankly, we'll be guided by Your  
4 Honor. I'm going to speak in generalities,  
5 but we're now starting to discuss confidential  
6 documents, sometimes highly confidential  
7 documents. I believe we have some witnesses  
8 in the room on the other side, who have not  
9 signed the protective order in order to view  
10 highly confidential documents.

11 JUDGE SIPPEL: We don't have to  
12 get into that.

13 MR. SCHMIDT: I'll stay at a high  
14 level of generality. Exhibit 35 is an Excel  
15 spreadsheet that does not have any custodian  
16 identified on it or any other individual  
17 witness identifying information. And that's  
18 why we've limited -- there were many, many  
19 exhibits to which we could have made this  
20 objection. That's why we limited it to  
21 exhibits like these, these six exhibits.

22 JUDGE SIPPEL: Well, I can, as I

1 said, I can -- these could be ruled on  
2 individually, if you're still going to persist  
3 in this, but I thought that counsel made a  
4 very good point and that is that these are  
5 your documents and if there's a spreadsheet,  
6 the assumption is that it was made in the  
7 course of business by somebody in your  
8 company.

9 Now if he wants to use it for what  
10 it's worth as just that, and feels he can make  
11 points on cross examination with it, then I  
12 don't understand where the -- I don't  
13 understand where the problem is, evidentiary  
14 problem, that is.

15 MR. SCHMIDT: The only concern we  
16 have, Your Honor, and again, that's why we  
17 limited ourselves to this narrow category is  
18 clearly there's an email that somebody wrote  
19 that is an admission or a business record or  
20 something of that nature. We're not making  
21 that objection. But if it's just a  
22 spreadsheet standing alone, where it's not

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1 clear from the record as it exists why it --  
2 what it is, who generated it, what purpose it  
3 was generated for, they still have to  
4 establish the foundation for its  
5 admissability.

6 We don't object to them doing that  
7 during the course of the hearing. And we're  
8 fine with them doing that during the course of  
9 the hearing, but we would say that absent them  
10 doing that, it can't come in.

11 JUDGE SIPPEL: Well, I see your  
12 point and I could ask for a further response  
13 on it, but here's my problem with all of that.  
14 We're trying to expedite this thing and I  
15 don't think I would have to cut the cheese  
16 that thin. If it meets the preliminaries of  
17 admission, if it turns out, however, that it's  
18 (a) you can show that it's not reliable or  
19 that just on its face it doesn't look very  
20 reliable, or I can't really make a  
21 determination because nobody has identified it  
22 anyway and it's not up -- unless it's on cross

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1 examination, it's not up to you to perfect  
2 their discovery, but they certainly, unless  
3 they come back at you with interrogatories and  
4 God forbid, we're not asking that.

5 I just don't see where this is  
6 going to be a problem. And since there are so  
7 few -- I mean, really, there are so few of  
8 them too. I would just -- you can remake the  
9 argument, as I read the document and I'll make  
10 a ruling on it. Okay?

11 MR. SCHMIDT: That's fair. And I  
12 think that might also address the final, broad  
13 category we had which are documents where we  
14 had concerns about relevance and about  
15 hearsay. Some of those are newspaper articles  
16 on various topics, and an example of that  
17 would be a newspaper article regarding several  
18 -- a newspaper article from a week or so ago  
19 about a deal that the NFL Network executed  
20 where that the NFL itself executed a week or  
21 so ago, not regarding the NFL Network, but  
22 regarding the Sunday ticket. There are other

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1 examples of documents like that.

2 Our basic view of the case is that  
3 this case is about how Comcast decided to  
4 carry the NFL Network, versus how it decided  
5 to carry the networks with which it was  
6 affiliated, primarily versus the Golf Channel,  
7 also the Major League Baseball Channel, as  
8 we've most recently learned. That's our  
9 conception of what the case is about.

10 A deal that the NFL struck a week  
11 or two ago regarding the Sunday ticket with a  
12 carrier other than Comcast, other issues  
13 relating to other cable companies that don't  
14 relate to the NFL Network, our view is that's  
15 not relevant, that's not part of what this  
16 proceeding is about. And in many cases, the  
17 evidence that Comcast is relying on to kind of  
18 prove up those allegations is hearsay.

19 Given what Your Honor has said  
20 thus far, we think that falls in the category  
21 of addressing it as it comes in because we  
22 would be going through it on a one-by-one

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1 basis and that's a longer list than our six  
2 documents.

3 JUDGE SIPPEL: Well, which you say  
4 a longer list, how long a list are you talking  
5 about, roughly speaking?

6 MR. SCHMIDT: We have I'd say  
7 probably 40 documents in that category.

8 JUDGE SIPPEL: Comcast, sir?

9 MR. CARROLL: Two or maybe three  
10 points. First, they have a ton of newspaper  
11 articles they've designated on their exhibit  
12 list, too. I assume that newspaper articles  
13 don't come in for the truth of the content of  
14 the newspaper article. They come in for some  
15 other purpose. I'm happy to say that as to  
16 their newspaper articles and I'm happy to have  
17 that being the case as to our newspaper  
18 articles. That is, normally newspaper  
19 articles wouldn't come in front of a Jury or  
20 other proceedings. I know we have to have as  
21 tight a line here because we don't have a  
22 Jury. And I'm not going to fuss over their

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1 newspaper articles because I expect Your Honor  
2 will take them for what they are, frankly,  
3 their newspaper articles.

4 I have a huge fundamental problem  
5 with -- this is my second point now -- with  
6 the point though that the deal they just did  
7 two weeks ago has nothing to do with this  
8 proceeding. Unless they're not going to seek  
9 a remedy from Your Honor and my position would  
10 be they never get to the remedy stage because  
11 I don't think they can show discrimination,  
12 but they're asking Your Honor to order fair  
13 terms, terms that they want for carriage and  
14 a price. Now they just cut two other deals  
15 with major distributors, Direct TV and Echo  
16 Star and I want to know what the price of  
17 those deals were and what the terms were  
18 because if they're going to argue that Your  
19 Honor should be considering market  
20 information, posing something on us, they've  
21 been very reluctant to share this information  
22 with us. And the reason we're referencing the

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1 one newspaper story is, we read about it in  
2 the newspaper.

3 JUDGE SIPPEL: What's the date of  
4 the newspaper -- this week, last week?

5 MR. CARROLL: A week, week and a  
6 half ago. Now Your Honor may remember another  
7 open motion that Your Honor has had for a  
8 while, there's a discovery motion that we  
9 filed. I don't think Your Honor has ruled on  
10 it yet, in which we're seeking access to deals  
11 they did with other carriers, other  
12 distributors that involved game rights. And  
13 they have refused to produce that material and  
14 we have briefed for Your Honor, separately,  
15 why we need that information.

16 This issue gets kind of near that  
17 and I don't think that Enterprises can have it  
18 both ways. If they're here telling Your Honor  
19 that they think they can show discrimination  
20 and if they show that, they want Your Honor to  
21 create the market terms under which we will  
22 carry them, how can they prevent this Court

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1 from having access to information about the  
2 contracts they are making with other people in  
3 the market right now? I just don't see it.

4 And it seems to me if that's their  
5 position, then they should drop the remedy  
6 request in the case. They can't have it both  
7 ways.

8 JUDGE SIPPEL: Are you suggesting,  
9 you don't know this for a fact yet, but are  
10 you suggesting that these other -- what you  
11 call it, these other deals would have a  
12 tendency to show that the deals they are  
13 accepting are within the framework or the  
14 ballpark, if I can use that term, of what  
15 you're offering them?

16 MR. CARROLL: Yes, in this sense,  
17 one of the issues that you'll hear a lot about  
18 is -- and we think one of the key issues in  
19 the case is price, that their product is too  
20 expensive. If they lower their price, they  
21 would get different carriage from us.

22 They want to show, as evidence,

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1       that their price is okay, that they have deals  
2       with other carriers at say a higher price.  
3       But our point as to those other deals is those  
4       other deals have other pieces to them, such as  
5       Sunday Ticket. Direct TV doesn't just cover  
6       NFL Network. Direct TV has an exclusive on  
7       what's called Sunday Ticket. I don't know if  
8       you're a football fan, but it's this thing  
9       that let's you see --

10               JUDGE SIPPEL: I'm not a football  
11       fan.

12               MR. CARROLL: All right, it's this  
13       thing that lets you see 20 football games all  
14       at once on a Sunday afternoon.

15               JUDGE SIPPEL: Twenty?

16               MR. CARROLL: It's about 20. It's  
17       like all the afternoon games, Direct TV.

18               JUDGE SIPPEL: I couldn't even  
19       look at 20 operas in an afternoon.

20               MR. CARROLL: And there are people  
21       who are fantasy players and there are gamblers  
22       and what not and if you ever -- they like to

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1 be able to go from screen to screen.

2 JUDGE SIPPEL: Heaven forbid.

3 MR. CARROLL: It's a valuable  
4 resource, and it's one that cable has never  
5 been allowed to get. Direct TV has an  
6 exclusive. Our point is contracts like that,  
7 you're not just -- the price you have to take  
8 out of those contracts, you have to look at  
9 all the other pieces of it, including that  
10 piece.

11 That's why we want to see -- they  
12 just did a billion dollar deal for a year,  
13 according to the newspaper, with Direct TV,  
14 one billion a year. And --

15 JUDGE SIPPEL: All right. We  
16 don't have to go that far.

17 MR. SCHMIDT: May I respond?

18 JUDGE SIPPEL: Well, of course,  
19 yes, yes.

20 MR. SCHMIDT: There's an  
21 unfairness is what Mr. Carroll said and it's  
22 this. This case involves the NFL Network.

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1 The NFL is an entity and this is why we  
2 distinguish between Enterprises which is the  
3 NFL Network and the NFL itself has different  
4 games packages that it sells. This is about  
5 the games that are shown on the NFL Network  
6 and the other product that's shown on the NFL  
7 Network. And as to that content, the NFL's  
8 agreements with Comcast and the NFL Network's  
9 agreements with other carriers, other MVPDs,  
10 they've got that. We've produced all of that.

11 In fact, a week ago, last week, we  
12 reached a settlement regarding one of these  
13 claims. That's what Mr. Carroll referred to  
14 when he referred to the Echo Star settlement.  
15 We produced that immediately. We produced the  
16 agreement, the affiliation agreement that was  
17 reached as a result of that settlement and  
18 today, we're producing the actual settlement  
19 agreement itself.

20 So where it's related to the NFL  
21 Network and its deals with MVPDs, we've  
22 produced those documents. They have those

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1 documents. That's what our expert relies on  
2 in coming up with his fair market price.

3 Their expert has not come up with  
4 his own fair market price, but that's what he  
5 relies on in attacking our expert's fair  
6 market price. That they have. They've got  
7 that data. But they wanted something more.  
8 They want to go beyond the agreements that the  
9 NFL Network itself has reached, which they've  
10 got right up to the minute, right up to the  
11 breaking news from last week in terms of a  
12 settlement of another litigation involving the  
13 NFL Network where they've got the affiliation  
14 agreement. They're getting the settlement  
15 agreement today. They want to go beyond that  
16 universe of agreements relating to the NFL  
17 Network, and they want to look at other  
18 agreements the NFL has entered into.

19 So the Sunday Ticket was not  
20 available on the NFL Network. It's not part  
21 of what's shown on the NFL Network. It's a  
22 completely different package and they want

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1 discovery on that. Our position is and it  
2 always has been, that has no relevance to this  
3 case, particularly not a settlement that arose  
4 a week ago, two, three, four years after the  
5 events that give rise to this litigation.  
6 That has nothing -- and it doesn't involve the  
7 network that's subject to this litigation.

8 JUDGE SIPPEL: Let me, I don't  
9 know, sir, I'm interested in a response, but  
10 am I hearing that there are two entities.  
11 There's an NFL Enterprises and there's an NFL  
12 something else, the network, and they're  
13 making deals separately?

14 MR. LEVY: Your Honor, the  
15 National Football League is a joint venture,  
16 if you will, of 32 clubs. They offer game  
17 programming. NFL Enterprises is owned by the  
18 32 clubs, but it's separate. NFL Enterprises  
19 and the NFL Network are essentially the same.  
20 The NFL Network is sort of the operating name  
21 for the entity that provides a channel on  
22 which 24/7 football programming is broadcast.

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1           What Mr. Schmidt has indicated is  
2           that to the extent that the NFL Network or NFL  
3           Enterprises which is the formal name of the  
4           entity that runs the NFL Network, has entered  
5           into carriage agreements or has entered into  
6           agreements with carriers, with MVPDs. They  
7           have got all of those carriage agreements.  
8           They've got all those affiliation agreements,  
9           including the affiliation agreement that was  
10          entered into last week. We promptly made that  
11          available to them.

12                 MR. SCHMIDT:   For the top ten  
13          largest.

14                 MR. LEVY:   Excuse me, for the top  
15          ten largest carriers. But for Sunday Ticket  
16          is a product that is separate and apart from  
17          NFL Enterprises. It is separate and apart  
18          from the Network. It is not shown on the  
19          Network. It is licensed directly from the  
20          National Football League to Direct TV.

21                 JUDGE SIPPEL:   Okay, so Sunday  
22          Network -- I'm sorry, Sunday Ticket, rather,

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